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No. 95-6465

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAY LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND DISTRICT OF COLUMBIA *AMICI*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN VANDERSTAR
JEFFREY B. COOPERSMITH
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-5453

DAVID A. REISER
(Counsel of Record)
Appellate Clinic
George Washington University
Law School
2000 G Street, N.W.
Washington, D.C. 20052
(202) 994-7463

38 pp

STEVEN R. SHAPIRO
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ARTHUR B. SPITZER
American Civil Liberties Union of
the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

JAMES W. KLEIN
JAMIE S. GARDNER
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

JOHN M. COPACINO
Criminal Justice Clinic
Georgetown University Law Center
111 F Street, N.W.
Washington, D.C. 20001
(202) 662-9575

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INTERESTS OF AMICI[1]

Amici are three national membership organizations, and three organizations that provide legal representation to indigent persons accused of crime in the District of Columbia, all of which share an interest in the preservation of the right to jury trial.

The National Legal Aid and Defender Association (NLADA). NLADA is a nationwide non-profit organization, dedicated to the provision of quality legal services in criminal and civil cases to persons financially unable to obtain counsel. Its membership includes most public defender offices around the country, as well as many assigned defense counsel.

The National Association of Criminal Defense Lawyers (NACDL). NACDL is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 8,700 attorneys. The NACDL is affiliated with 68 state and local criminal defense organization with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide.

The American Civil Liberties Union (ACLU). The ACLU is a non-profit, non-partisan organization with nearly 300,000 members nationwide. The ACLU is dedicated to the preservation of individual rights and to the participation of citizens in governance. Both are implicated in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The District of Columbia *Amici*. The Public Defender Service for the District of Columbia (PDS) was established by Congress in 1970 to provide representation to indigent criminal defendants in the local and federal courts of the District of Columbia. Students in the Georgetown University Law Center Criminal Justice Clinic (GULC-CJC) have provided representation to defendants in misdemeanor cases in the District of Columbia Superior Court since 1972. Students in the George Washington University Law School Appellate Clinic (GW-AC) represent indigent clients in appeals from criminal convictions before the District of Columbia Court of Appeals.

PDS, GULC-CJC, and GW-AC, together with the American Civil Liberties Union of the National Capital Area, the local affiliate of the ACLU, participated as *amici curiae* in *Burgess v. United States*, No. 95-1352, a case currently pending before the District of Columbia Court of Appeals sitting *en banc* that involves the same issue presented by the Petition for Writ of Certiorari in this case. *Burgess* did not raise the second issue before this Court, because the trial judge made no sentencing promises before trial, and because the United States acknowledged that such a promise would have no effect on a defendant's right to jury trial under the Constitution.

SUMMARY OF THE ARGUMENT

Petitioner Lewis was tried for two counts of obstructing the United States mail, offenses for which Congress authorized an aggregate term of imprisonment of one year, the same penalty authorized for the offense of assault charged in *Baldwin v. New York*, 399 U.S. 66 (1970). Lewis was entitled to a jury trial for the same reason as Baldwin: the authorized penalty for the charges he faced in a single proceeding exceeded "that allowable for a petty

criminal offense." *Codispoti v. Pennsylvania*, 418 U.S. 506, 516 (1974). The only distinction between this case and *Baldwin* is that the prosecution in *Baldwin* involved a single count, and this case involves two. This distinction cannot make a constitutional difference. When tried together, the two offenses charged here for obstructing the mail on two consecutive days are no different in their seriousness from a single continuing offense carrying a one year penalty for the same conduct. The right to jury trial applies to this prosecution, just as it would to the continuing offense.

The Court has relied on a simple, bright-line standard to distinguish petty offenses from "crimes" requiring a jury trial. "[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69. As the Court recognized in *Codispoti*, when several offenses are tried together and their authorized penalties exceed six months' imprisonment, these offenses are "equivalent to a serious offense." 418 U.S. at 517. The penalty authorized by the legislature plays an important role in deciding whether society deems an offense serious in nature, *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989), but it also plays an independent role in delimiting the petty offense exception. This Court has never before exempted a prosecution in which the authorized penalties "'puncture the 6-month incarceration line,'" *id.* at 543 (quoting Brief for Petitioner at 16), from the ambit of Article III and the Sixth Amendment and it should not do so now. The six month dividing line serves the dual purposes of the jury trial clauses; "to prevent oppression by the Government," *Duncan*, 391 U.S. at 155, and to secure "[t]he opportunity for ordinary citizens to participate in the administration of justice." *Powers v. Ohio*, 499 U.S. 400, 406 (1991). A crime is no less serious, from the perspective of the prisoner ordered to serve the sentence, or that of the community

asked to accept the legitimacy of the punishment, because it is charged in two counts tried together rather than one count with the same penalty.

Nor is an otherwise serious criminal prosecution made petty by a judicial officer's promise to impose a sentence of six months' imprisonment or less. This Court has already held it is the sentence authorized by the legislature (or the court, for criminal contempts), not the actual sentence imposed, that determines the right to jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 159-60 (1968). The only difference between a promised sentence and an actual sentence of less than six months is that the accused has no fear of a greater penalty at the beginning of the trial. But the jury trial clauses were not included in the Constitution to relieve anxiety; rather, they provide a bulwark of ordinary citizens against the power of the government, including the judiciary, in all criminal prosecutions.

Also, no principle could confine the effect of a judge's sentencing promise to cases like this one, where the basis for the right to jury trial is the aggregate penalty for several counts. Giving effect to such a promise would allow a judge to deny a jury trial for any crime, regardless of the authorized penalty, so long as the judge was willing to trade a lighter sentence for the administrative ease of a bench trial. But the legislative branch must strike this balance — subject to the six month limit — not a busy trial judge. Allowing sentencing promises to determine the right to jury trial would also pose serious practical problems, because a judge can neither exercise informed discretion without gathering information about the offense and the offender, nor gather such information without tainting the trial.

ARGUMENT

THE CONSTITUTION CONFERS A RIGHT TO JURY TRIAL IN ANY PROSECUTION FOR WHICH THE AUTHORIZED PENALTY EXCEEDS SIX MONTHS' IMPRISONMENT.

This Court has determined that "[t]he possibility of a sentence exceeding six months . . . is 'sufficiently severe by itself' to require the opportunity for a jury trial." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970)). The question here is how that rule should be applied to a prosecution in which the aggregate penalty authorized for all counts exceeds six months, but the penalty authorized for each count alone is six months or less. To achieve its purpose, the *Baldwin* rule must apply to the entire prosecution. That is how the Court applied *Baldwin* to a single prosecution for seven counts of criminal contempt in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974). The text of the Constitution requires this result, because it confers a right to jury trial for "all crimes," and in "all criminal prosecutions," rather than for individual counts in a prosecution. Moreover, any application of the jury trial clauses must respect the "profound judgment," *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968), that decisions about life and liberty — in all but truly petty matters — were entrusted to juries as a check on the power of government.

A. The Court Has Adopted a Bright Line Rule that Treats an Authorized Penalty of More than Six Months' Imprisonment — for One Count or Several — as Serious.

Article III and the Sixth Amendment secure the right to jury trial for "*all* crimes" and "*all* criminal prosecutions." Because English common law exempted petty offenses from the right to jury trial, however, this Court has read such an exception into the constitutional text. *Duncan*, 391 U.S. at 159. To distinguish petty offenses from crimes triable by jury this Court has drawn a bright line in *Baldwin v. New York*, 399 U.S. 66 (1970), *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), and *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), based on the authorized penalty: "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69 (footnote omitted). This standard is easy to apply, whether to one offense or to several. In *Codispoti*, the Court overturned judgments for criminal contempt for which the trial judge imposed consecutive sentences totaling more than six months, "a ruling which necessarily extended the prison term to be served *beyond that allowable for a petty criminal offense*." 418 U.S. at 516 (emphasis added).[2] When the penalties authorized by the legislature for offenses tried together in a single proceeding exceed six months, they go "beyond that allowable for a petty criminal offense," and the defendant is entitled to a jury trial.

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[2] "In criminal contempt prosecutions, 'where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense,'" *Blanton*, 489 U.S. at 542 n.6 (quoting *Frank v. United States*, 395 U.S. 147, 149 (1969)), whereas the penalty authorized by the legislature controls here.

Criminal conduct does not come neatly pre-packaged as "offenses." The authorized consequences of each criminal prosecution are determined by a combination of legislative action — the definitions of offenses and their maximum sentences — and executive action — the decision to select charges and to join them for prosecution. The Constitution's criminal jury trial provisions would provide little protection against arbitrary power to the accused and little right of participation to the citizen if a prosecutor's charging decision conclusively determined the right to jury trial regardless of the penalty authorized for the entire proceeding.

Legislatures have a great deal of leeway in defining crimes and specifying their penalties. For example, Petitioner Lewis was charged with two counts of obstructing the mail, in violation of 18 U.S.C. § 1701, with each count relating to conduct on a different day. *United States v. Lewis*, 65 F.3d 252, 253 (2d Cir. 1995). But Lewis was observed opening (and obstructing) several pieces of mail on June 3; depending upon the unit of prosecution chosen by the legislature, each act could have constituted a separate offense, subject to a separate penalty.[3] On the other hand,

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[3] *See Bell v. United States*, 349 U.S. 81 (1955) (transportation of several women across state lines for immoral purposes was single violation of the Mann Act); *United States v. Cooper*, 966 F.2d 936, 943 n.11 (5th Cir.), *cert. denied*, 506 U.S. 980 (1992) (unit of prosecution for making building available as a crack house, 21 U.S.C. § 856(a)(2)); *United States v. Wall*, 37 F.3d 1443, 1445 (10th Cir. 1994) (bank fraud, 18 U.S.C. § 1344(2)); *United States v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987), *cert. denied*, 485 U.S. 908 (1988) (use of a minor to create sexually explicit visual images, 18 U.S.C. § 2251(a)); *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993) (tax evasion, 26 U.S.C. § 7201); *United States v. Davenport*, 929 F.2d 1169, 1172 (7th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992) (structuring currency transactions, 31 U.S.C. § 5324(3)); *United States*

(continued...)

some crimes are defined as "continuing offenses" that may include conduct over the course of several days, weeks, or years, *see Brown v. Ohio*, 432 U.S. 161, 169-70 (1977), so that Lewis' crime on both days could just as easily have been defined as a single offense. Moreover, this Court's decision in *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983), determined that even when two statutes include the same elements, "[w]here . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." For this reason, the legislature has the authority to subdivide any prohibited criminal conduct into overlapping offenses for which consecutive sentences could be imposed. A prosecutor may choose to join any number of such offenses in a single prosecution under Fed. R. Crim. P. 8. A jury trial right that depends only on the penalty specified for a count in an information, and allows unlimited penalties to be imposed for the same conduct in a single non-jury trial, provides no defense against government oppression.

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[3](...continued)
v. Langford, 946 F.2d 798 (11th Cir. 1991), *cert. denied*, 503 U.S. 960 (1992) (use of mail to commit securities fraud, 15 U.S.C. § 78j(b)); *United States v. Song*, 934 F.2d 105, 108-9 (7th Cir. 1991) (trademark offense, 18 U.S.C. § 2320); *United States v. Ravel*, 930 F.2d 721, 724 (9th Cir.), *cert. denied*, 502 U.S. 911 (1991) (possession of stolen merchandise, 18 U.S.C. § 659); *Jackson v. United States*, 926 F.2d 763 (8th Cir.), *cert. denied*, 502 U.S. 967 (1991) (possession of unregistered firearms, 26 U.S.C. § 5861).

1. The Court Has Already Resolved the Issue Presented Here in *Codispoti*.

The only decision by this Court to have applied the Sixth Amendment to a joint trial of several counts, each carrying a maximum penalty of six months' imprisonment or less, is *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), where the Court overturned criminal contempt judgments because the aggregate penalty imposed as a result of a single proceeding exceeded six months. Following the decision in *Codispoti*, every federal court to consider the issue, until the decision below in *Lewis*, concluded that a jury was required for a single trial on several individually petty offenses if the aggregate penalty was greater than six months.[4] In addition, two state supreme courts that had previously concluded no jury trial was required when each offense was punishable by less than six months reversed themselves after *Codispoti*.[5] The common defect in the recent decisions concluding that

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[4] *Lewis*, 65 F.3d at 254 (collecting cases). The Second Circuit omitted the decision in *United States v. Semple*, 661 F. Supp. 556, 557 (D.D.C. 1987), from its list, but we think this was appropriate because the district judge in *Semple* based his decision on what he erroneously believed to be binding precedent from the local District of Columbia courts.

[5] *State v. McCarroll*, 337 So. 2d 475, 480 (La. 1976) (overruling *City of Monroe v. Wilhite*, 233 So. 2d 535 (La.), *cert. denied*, 400 U.S. 910 (1970)); *State v. Sanchez*, 786 P.2d 42 (N.M. 1990) (overruling *State v. James*, 415 P.2d 543 (N.M. 1966)). An unpublished intermediate appellate court decision in *State v. Goering*, No. A-93-1128, 1994 Neb. App. LEXIS 309 (Neb. App. Oct. 25, 1994), *cert. denied*, 115 S. Ct. 1963 (1995), is the only post-*Codispoti* state case of which we are aware that has upheld convictions in a multiple count prosecution for which an aggregate sentence of more than six months' imprisonment was authorized. *Goering* relied on the actual, rather than the authorized sentence, contrary to the teaching of *Duncan*, 391 U.S. at 159-60.

a jury trial is not required when the authorized aggregate penalty exceeds six months' imprisonment is that they either ignore *Codispoti* entirely, or mistakenly deem it irrelevant. *See Lewis*, 65 F.3d at 255; *United States v. Brown*, 71 F.3d 845 (11th Cir. 1996); *see also United States v. Coppins*, 953 F.2d 86, 91-92 (4th Cir. 1991) (Niemeyer, J., dissenting).[6] Properly understood, *Codispoti* resolves the issue now before the Court.

Codispoti was sentenced to fourteen years in prison for seven separate criminal contempts committed on separate days of a criminal trial in which Codispoti served as his own counsel. The Court vacated these summary contempt judgments, remanding for trial before a different judge. 418 U.S. at 507 (citing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)). On remand, Codispoti requested a jury trial, which was denied. After reviewing the transcripts of the 1966 trial, the new judge found Codispoti guilty as charged, and sentenced him to six months in prison for each of six counts, and to a term of three months for the remaining count, with each sentence to run consecutively. *Id.* at 509.

The Court began its analysis by describing "a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are

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[6] Judge Niemeyer did not cite *Codispoti* at all in his *Coppins* dissent and neither did the Eleventh Circuit in *Brown*. Neither party cited *Codispoti* in their briefs to the Second Circuit below, although both sides cited cases discussing *Codispoti*. The *Lewis* court concluded that "[w]hile *Codispoti* controls in those circumstances in which no maximum penalty is provided by law, it does not affect the analysis when Congress has provided a specific measure of the seriousness of a particular crime -- then, as now, aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial." 65 F.3d at 255.

serious crimes and those carrying a sentence of six months or less are petty crimes." *Id.* at 512. Explaining the issue before the Court, Justice White acknowledged that, "[o]ur cases, . . . do not expressly address petitioners' remaining argument that they were entitled to jury trials because the prison sentences imposed after post trial convictions for contemptuous acts during trial were to be served consecutively and, although each was no more than six months, aggregated more than six months in jail." *Id.* at 512-13. Pennsylvania argued "that petitioners' contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury." *Id.* at 517.

The Court rejected the state's argument that it should look at each count separately, rather than apply the "fixed dividing line" to the prosecution as a whole:

> Here the contempts against each petitioner were tried seriatim in one proceeding, and the trial judge not only imposed a separate sentence for each contempt but also determined that the individual sentences were to run consecutively rather than concurrently, a ruling which necessarily extended the prison term to be served beyond that allowable for a petty criminal offense. *As a result of this single proceeding*, Codispoti was sentenced to three years and three months for his seven contemptuous acts, Langnes [a co-defendant] to two years and eight months for his six contempts. In terms of the sentence imposed, which was obviously several times more than six months, each

> contemnor was tried for what was *equivalent to a serious offense and was entitled to a jury trial.*

Id. at 516-17 (emphasis added). Although the Court divided over the disposition of the case,[7] no Justice registered disagreement with the proposition that the aggregate sentence, rather than the sentence for each count, was dispositive of the jury trial claim.

2. *Codispoti* Is Not Limited to Contempts.

Notwithstanding the clear import of *Codispoti*, the court below insisted that "aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial." 65 F.3d at 255. The *Lewis* court thought it was not bound by *Codispoti*, because it was a contempt case. However, *Codispoti* cannot be meaningfully distinguished from this case on the ground that it involved contempt charges. First, the Court in *Blanton* cited *Codispoti* along with *Baldwin* for the proposition that "[w]e held 'only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of []petty[].'" *Blanton*, 489 U.S. at 538 (quoting *Baldwin*, 399 U.S. at 69 n.6, and citing *Codispoti*, 418 U.S. at 506, 512 n.4) (emphasis deleted). The *Blanton* Court did not shy away from relying on *Codispoti* because it was a contempt case. Even more importantly, however, the *Codispoti* decision itself stated

[7] Justice Blackmun authored a dissent, joined by Chief Justice Burger, and Justices Stewart and Rehnquist, arguing that the right to jury trial was inapplicable to "direct" criminal contempts. 418 U.S. at 522-23. In a separate dissent, Justice Rehnquist argued that *Duncan* should not be applied, because Codispoti had first been convicted of the contempts in 1966. *Id.* at 533.

that: "criminal contempt is a crime in every fundamental respect. . . .'[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, *there is no substantial difference between serious contempts and other serious crimes.*'" *Codispoti*, 418 U.S. at 516 (emphasis added; citation omitted; alteration in original); *see also Taylor v. Hayes*, 418 U.S. 488, 495 (1974).[8]

This Court addressed the aggregation issue in *Codispoti* with the assumption that each separate contempt charge was

[8] The application of the Sixth Amendment to the states in *Duncan* coincided with an equally important development in the law of contempt. In *Bloom v. Illinois*, 391 U.S. 194 (1968), decided the same day as *Duncan*, the Court proclaimed that, "[c]riminal contempt is a crime in the ordinary sense," 391 U.S. at 201, to which the right to trial by jury applied. Illinois law provided no maximum sentence for contempt. Bloom had been sentenced to prison for two years, the same penalty authorized for Duncan's crime. "Under the rule in [*Cheff v. Schnackenberg*, 384 U.S. 373 (1966)], when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look at the penalty as the best evidence of the seriousness of the offense." *Id.* at 211. Relying on its determination in *Duncan* that an offense punishable by two years' imprisonment was not petty, the Court held that Bloom had been denied a right to a jury trial. Since *Duncan* and *Bloom*, the jury trial clauses have been applied to contempts in the same way they have been to statutory offenses. *See Frank v. United States*, 395 U.S. 147 (1969) (criminal contempt punished by a term of three years' probation is a petty offense); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 219-220 (1968) (no right to jury trial for contempt where state law limited penalty to 10 days in jail and a $50 fine). *Bloom* and *Frank* show that -- except for the manner in which the authorized sentence is determined -- the jury trial right for criminal contempts and for statutory offenses is the same.

a petty offense, and concluded that these otherwise petty offenses aggregated together were "*equivalent to a serious offense*" for purposes of the jury trial right. 418 U.S. at 516 (emphasis added). The *only* difference between *Codispoti* and a non-contempt aggregation case is that in *Codispoti* the Pennsylvania trial court determined that the offenses were "petty," while for other crimes the legislature would have made this determination. But once such a determination has been made, the analysis of whether a jury trial is required is the same, and *Codispoti* therefore cannot be dismissed, as it was by the Second Circuit, because it involved contempt offenses.

The United States has argued elsewhere, however, that the decision in *Codispoti* was really based on the need to rein in potential abuses of the contempt power: "Thus understood, *Codispoti* merely deprives a trial judge of the power to avoid the constitutional requirement of jury trial by *post hoc* parsing of a single contempt into multiple charges."[9] It would, naturally, raise concerns if a judge intentionally manipulated contempt charges to circumvent the right to jury trial, but the opinion in *Codispoti* does not betray a hint that the Court suspected such an abuse. Indeed, the decision to treat Codispoti's conduct as seven separate contempts, rather than as a single crime, was made by the original trial judge in 1966, before this Court had even decided *Duncan* and *Bloom*.[10] The judge had no

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[9] Brief for Appellee before the En Banc Court at 35, *Burgess v. United States*, (D.C.) (No. 95-CM-1352).

[10] Moreover, the plurality would hardly have agreed that the trial judge could have levied the same penalties in separate summary contempt proceedings, if the objective had been to restrain the contempt power. *See* 418 U.S. at 513-15 (plurality). *But see* 418 U.S. at 519 (Marshall, J., concurring in part).

reason to structure the contempt charges to avoid constitutional rulings that had not been made. *See* 418 U.S. at 533 (Rehnquist, J., dissenting) (arguing that *Duncan* should not be applied because the original contempt judgments predated that decision). Rather than hinging the jury trial right on an unproductive inquiry into the charging official's subjective intentions, *Codispoti* sticks to the bright line rule. Furthermore, concerns about structuring prosecutions to avoid jury trials are not limited to criminal contempts. The same potential for evasion and abuse would exist if prosecutors were free to reassemble serious crimes as packages of petty offenses. Instead of a "fixed dividing line" related to our society's notion of what kinds of criminal punishments must bear the imprimatur of the community, we would have a purely arbitrary line that would depend entirely on prosecutorial discretion.

B. The Seriousness of the Penalty Is a Basis for Requiring a Jury Trial, Independent of the Nature of the Offense.

This Court has historically used both "the nature of the offense and the amount of punishment prescribed," to determine whether prosecution is "petty" rather than criminal. *Schick v. United States*, 195 U.S. 65, 68 (1904). Petty offenses are those that neither carry a serious penalty, nor are by their nature otherwise serious. The Court's reliance on penalty in recent years to determine the nature of the offense should not obscure the independent role that the potential loss of liberty has always played in the petty offense cases. Because the aggregate penalty here was serious, the nature of the individual counts does not affect Petitioner's right to a jury trial.

The jury trial provisions of Article III and the Sixth Amendment were intended to preserve the right to jury trial

as it existed under English common law. Although both the Sixth Amendment and Article III are by their terms absolute, "[i]t has long been settled that 'there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" *Blanton*, 489 U.S. at 541 (quoting *Duncan*, 391 U.S. at 159)). The words of the Constitution — "all crimes" and "all criminal prosecutions" — "cannot be interpreted safely except by reference to the common law and British institutions as they were when the instrument was framed and adopted." Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 921 (1926) (quoting *Ex parte Grossman*, 267 U.S. 87, 108 (1925)). English justices of the peace exercised limited "summary jurisdiction" to try petty offenses without a jury, and this practice persisted in the colonies and then in the new United States, notwithstanding the adoption of state constitutional provisions guaranteeing the right to jury trial. "Broadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light." *Id.* at 980-81.[11]

In *Callan v. Wilson*, 127 U.S. 540, 549 (1888), the

[11] When an offense has a specific common law antecedent, however, the Court has held that the Constitution preserves the right to jury trial, regardless of the modern penalty. *District of Columbia v. Colts*, 282 U.S. 63 (1930) (reckless driving, punishable by a $25 fine and up to thirty days in jail, was jury-triable at common law). Although the Court has undoubtedly "moved away" from reliance on common law offenses, it has not overruled *Colts*, or other decisions using a common law test. *See Blanton*, 489 U.S. at 541 & n.5. We agree with Petitioner that obstruction of the mail was a serious offense at common law, and that he was entitled to a jury trial on that basis as well. Pet. Br. at 24-6.

Court's first petty offense case, the Court explained that the word "crime" in Article III, "embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen." In *Schick*, the Court upheld waivers of the right to jury trial, concluding that receiving unbranded oleomargarine was a petty offense. Responding to the claim that the offense was a crime because it was included in legislation providing elsewhere for substantial criminal penalties, Justice Brewer wrote: "The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determines whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense." 195 U.S. at 68.

In *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937), the Court accepted the defendant's concession that the offense of dealing in second hand property without a license was, by its nature, a petty offense. Nevertheless, the Court went on to consider whether the statutory penalty — a fine of $300 and imprisonment for up to 90 days — provided a basis for a jury trial. Agreeing that "the question is not free from doubt," *id.*, the Court examined the penalties for petty offenses under English and colonial law, and found it "impossible to say that a ninety day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted." *Id.* at 626-27. Significantly, the Court presaged the adoption of the six month rule in *Baldwin*:

> But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible

> without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.

Id. at 627-28 (footnote omitted).

Duncan v. Louisiana held the right to jury trial applicable to the states through the Fourteenth Amendment. 391 U.S. at 156. Turning to Louisiana's contention that Duncan was not entitled to a jury trial in any event, because he was sentenced to only sixty days in a parish prison, the Court restated the rule for federal offenses: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. But *the penalty authorized* for a particular crime is of major relevance in determining whether it is serious or not and *may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.*" *Id.* at 159 (citations omitted; emphasis added).

The Court relied on "objective criteria, chiefly the existing laws and practices in the Nation," to decide whether the maximum penalty for battery — imprisonment for up to two years and a fine — required a jury trial. *Id.* at 161. The Court noted that "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule." *Id.* Current state practice also supported a six-month rule. In a footnote, the Court observed that "there appear to be only two instances, aside from the Louisiana scheme, in

which a State denies jury trial for a crime punishable by imprisonment for longer than six months." *Id.* at 161 n.33. The Court declined, however, to "settle in this case the exact location of the line between petty offenses and serious crimes," *id.* at 161, finding it sufficient to hold that a crime punishable by two years imprisonment was not a petty offense, *id.* at 161-62.

Finally, in *Baldwin v. New York*, 399 U.S. 66 (1970), the Court "concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69 (plurality opinion).[12] The Court recognized that previous decisions had considered the nature of the offense as well as the authorized penalty. *Id. at 69* n.6. The Court found it unnecessary to consider the nature of the offense in *Baldwin*, however, deciding "only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'" *Id.* The Court drew the line at six months on the basis of a "near-uniform judgment" that a jury trial is required "when what is at stake is the deprivation of individual liberty for a period exceeding six months." *Id.* at 72. Because Baldwin faced a maximum authorized sentence of one year, the same sentence authorized for Petitioner Lewis' two offenses, the Court reversed his conviction.

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[12] Justice White authored the opinion of the Court, joined by Justices Brennan and Marshall. Justices Black and Douglas concurred in the judgment, reiterating their view that any offense punishable by imprisonment merits a jury trial under the Constitution. 399 U.S. at 74-75. Chief Justice Burger, and Justices Stewart and Harlan wrote separate dissents. *id.* at 76; 117; and 143. Because the plurality's ruling is narrower than the view articulated in the concurring opinion, it constitutes the holding of this Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

In *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), the Court moved closer to a rule distinguishing petty offenses from crimes solely by reference to penalty. Although the Court did not overrule its "early decisions focus[ing] on the nature of the offense and on whether it was triable by a jury at common law," *id.* at 541, the decision in *Blanton* adopted a presumption that society views an offense punishable by six months' imprisonment or less as petty. *Id.* at 543.[13]

The Court justified its "decision to move away from inquiries into such matters as the nature of the offense," and to rely instead on the objective measure of the authorized penalty, in part on "the substantial number of statutory offenses lacking common-law antecedents," *id.* at 541 n.5. *Blanton* makes clear, however, that once the "6-month incarceration line" is crossed, the inquiry into seriousness comes to an end. The views of society about the seriousness of an offense expressed through the legislature matter only when the penalty itself does not "'puncture the 6-month incarceration line.'" 489 U.S. at 543.

Nevertheless, *Blanton* has been misinterpreted as authority for disregarding the aggregate penalty in a multiple

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[13] A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line."

Id. (citation and footnote omitted).

count prosecution. *See Brown*, 71 F.3d at 847; *Lewis*, 65 F.3d at 254. In his dissent in *Coppins*, Judge Niemeyer wrote:

> The fact remains that the defendant is charged with separate, petty offenses, each constituting a crime for which the defendant would not be entitled to a jury trial. The meaningful constitutional object of inquiry is the *offense* with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging document. Judicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial. This is the case where multiple zeros still add up to zero.

953 F.2d at 92. Neither this reasoning, nor this arithmetic, adds up. As this Court recognized in *Codispoti*, "the accumulation of offenses tried on a given day" does matter. The aggregate penalty authorized for a single proceeding *is* an object of constitutional inquiry, even if the legislature has deemed each count to be a petty offense. Moreover, the penalties for "petty offenses" are not "zeroes" that sum to zero, but periods of incarceration that when strung together as they were in *Codispoti*, are "equivalent to a serious offense."

Contrary to Judge Niemeyer and to the Second Circuit below, a plurality of the *Codispoti* court saw an important difference between a single trial with an aggregate penalty greater than six months' imprisonment and a series of summary contempt trials, each punishable by six months or less, "even if the total punishment meted out" exceeded six

months. 418 U.S. at 515.[14] Justice Marshall, later the author of *Blanton*, thought a jury trial should be available, even for separate summary proceedings.[15] Like Justice White's opinion, Justice Marshall's concurrence stressed "that a six month sentence is the constitutional dividing line between serious offenses for which trial by jury must be afforded and petty offenses, and that in contempt cases it is the sentence actually imposed rather than the penalty authorized by law which is determinative." *Id.* at 519.

Blanton did not entrust the Sixth Amendment to the legislature; rather, it adopted an objective bright-line judicial standard that defers to the legislature's judgment about the seriousness of a given offense, provided the accused is not

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[14] We think the court below was wrong in suggesting that the fact that prosecutors could avoid jury trials by charging petty offenses separately has any bearing on how to apply the jury trial clauses to a single joint prosecution. *See Lewis*, 65 F.3d at 255. Prosecutors have substantial incentives to join related offenses for trial, *see United States v. Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993), whether or not this means a defendant is entitled to jury trial, so that continuing to require jury trials in multiple count prosecutions will not create new administrative burdens for the courts, even in those two Circuits that have recently adopted a contrary rule. In addition, prosecutors will remain free to pursue single count prosecutions for petty offenses in cases in which they conclude the advantages of a bench trial justify seeking only a petty sentence. What prosecutors cannot do — as they did here — is to have it both ways, seeking serious penalties in a non-jury proceeding.

[15] Although *amici* share Justice Marshall's concerns about potential abuse of the summary contempt power, we think these are better addressed under the rubric of the Due Process Clause. *Cf. United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994). In addition, the summary proceedings must be truly separate. When sentencing for summary contempts committed in the same proceeding is deferred, the six month limitation applies to the aggregate penalty for all counts. *Taylor v. Hayes*, 418 U.S. 488, 495-96 (1974).

threatened with the loss of more than six months of liberty.[16] A "fixed dividing line" based upon objective criteria cannot be oblivious to the real world difference between a trial on a single count with a maximum authorized sentence of six months, and a trial on several counts, with no limit on the authorized punishment.

C. The Right to Jury Trial Is Not Only an Individual Right of the Defendant; the Jury Trial Clauses Protect the Legitimacy of the Criminal Law by Assuring the Community's Participation in the Determination of Guilt or Innocence When Serious Penalties Are at Stake.

The proponent of an exception to the right to jury trial, has a heavy burden of justification not only because of the inclusive language of the constitutional text, but also because the jury plays a central role in our constitutional framework. "Jury trial was a valued right of persons accused of crime, and it was also an allocation of political power to the citizenry." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994). De Tocqueville described the American jury as "a political institution . . . one form of the sovereignty of the people." 1 DEMOCRACY IN AMERICA 335 (Reeves trans., J.S. Mill ed., 1961). It was,

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[16] The court below relied on 18 U.S.C. § 3584(a) as evidence of a legislative determination "that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." 65 F.3d at 255. This statute, does not, however, place any limits on the power of the court to impose consecutive sentences, and does not, therefore, actually limit the authorized penalty for multiple counts when tried together. Rather, section 3584(a) establishes a rule of construction when a sentencing judge fails to specify whether sentences are imposed consecutively or concurrently.

a "school . . . in which each juror learns his rights." *Id.* at 337.

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. In *Balzac v. Porto Rico*, Chief Justice Taft wrote for the Court:
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> > "The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."

Powers v. Ohio, 499 U.S. 400, 406 (1991) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922); alteration in original; other citations omitted). Indeed, it is this right and duty "of participation in the machinery of justice," in addition to the right of the individual, that underlies this Court's steadfast refusal to tolerate discrimination in jury selection. *See, e.g., Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam); *Powers*, 499 U.S. at 406; *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 n.14 (1994).

"The framers' enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution." Alschuler & Deiss, 61 U. CHI. L. REV. at 871. One of the complaints registered against the King in the Declaration of Independence was that he had deprived the colonists "of the

benefits of trial by jury." As a result of their colonial experience, the authors of Article III and the Sixth Amendment came to view the participation of citizens in the judicial process through jury service as a vital safeguard against government oppression. "[J]ury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan,* 391 U.S. at 156. From the perspective of the community asked to accept the legitimacy of criminal punishment, as from the perspective of the prisoner required to serve the sentence, there is no difference between a sentence imposed in a single prosecution for one count or for several counts.

The inclusion of the right to jury trial in Article III reflects its structural importance because the original Constitution largely took for granted the preservation of individual rights. "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. In Federalist 83, Hamilton responded to those objecting to the proposed Constitution because it did not expressly provide for the right to jury trial in civil cases.[17] Hamilton recognized that concerns over the silence of the Constitution with respect to

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[17] THE FEDERALIST PAPERS 495-510 (Clinton Rossiter ed., 1961)

civil cases had spilled over to criminal cases, and he took pains to reassure his readers that legislative authority over the mode of trial, "in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases." *Id.* at 496-97. Despite these assurances, concerns about preserving the right to jury trial were strong enough that a number of States called for the inclusion of a right to jury trial in criminal cases in the Bill of Rights, to which Congress ultimately acceded by proposing the jury trial clause of the Sixth Amendment. *See* Frankfurter & Corcoran, 39 HARV. L. REV. at 968-75; *Singer v. United States*, 380 U.S. 24, 31 (1965).

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155. As the Court has recently observed, the abridgment of the jury's role in a criminal case is a structural defect, "without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, ___, 113 S. Ct. 2078, 2083 (1993). The constitutional rights to jury trial secure a degree of citizen participation in governance as well as provide a safeguard for the accused. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. These reciprocal rights provide a constitutional foundation for the legitimacy of criminal sanctions in our society, because for all but "petty offenses" the precondition for criminal punishment is the "common-sense judgment of a jury," *Duncan*, 391 U.S. at 155, about guilt or innocence. This "ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407 (citing *Green v. United States*, 356 U.S. 165, 215 (1958) (Black, J., dissenting)). The fixed dividing line assures the participation of the community in all decisions affecting

more than six months of liberty. It would, truly, raise form over substance if — by charging several counts rather than one — prosecutors could seek serious criminal penalties without presenting their case to a jury.

D. A Trial Judge Cannot Deprive the Accused of the Right to a Jury Trial by Promising to Impose a Sentence No Greater Than Six Months' Imprisonment.

The Second Circuit below properly declined to rely on the magistrate judge's promise not to sentence Lewis to more than six months in prison as a reason for upholding his convictions in a bench trial. 65 F.3d at 255.[18] The right to jury trial is a check on the powers of the judiciary, as well as the executive and legislative branches. *Duncan*, 391 U.S. at 156. The subjective decision of an individual trial judge — who may be preoccupied with the management of a lengthy docket — that a particular case does not require a sentence of more than six months cannot nullify the legislature's determination that the penalty authorized for the prosecution exceeds "that allowable for a petty criminal offense." *Codispoti*, 418 U.S. at 516. If, as this Court held in *Blanton*, 489 U.S. at 541-42, "[t]he judiciary should not substitute its judgment as to seriousness for that of the legislature," about an entire category of offenses, certainly a single trial judge should not be allowed to do so about a single case. Allowing a judge to avoid holding a jury trial by promising before trial to limit the sentence would substitute that judge's view of the seriousness of the case for

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[18] The U.S. Attorney for the District of Columbia argued that such promises would have no effect on the right to jury trial in *Burgess*. No transcript of the *Burgess* argument is available, however the government previously made the same point in its Brief for Respondent at 37-38, *Foster v. Canan*, 661 A.2d 676 (D.C. 1995).

the legislature's judgment expressed by the maximum authorized penalties for the offenses.

This Court has already decided that it is the authorized penalty for an offense, rather than the actual sentence imposed after trial (except for criminal contempts, where the sentence imposed is the authorized sentence) that determines the right to jury trial. *Duncan*, 391 U.S. at 159-60. The only difference between a pretrial promise to limit the sentence to less than six months and an actual sentence of less than six months after trial is that the defendant would have no subjective fear of a more serious punishment. But the six month line between petty offenses and crimes is not concerned so much with reducing the defendant's subjective apprehension of a long sentence, as it is with identifying those prosecutions that must be submitted to the community because of their authorized penalty. If individual trial judges had the power to deny jury trials whenever they were willing to promise a sentence of less than six months' imprisonment, they could do so even in a felony case.[19]

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[19] The issue here is fundamentally different from the question before the Court in *Scott v. Illinois*, 440 U.S. 367 (1979), because the purpose of the jury trial clauses is not to enhance the reliability of verdicts in criminal trials. This Court in *Duncan* acknowledged the continuing debate, "as to the wisdom of permitting untrained layman to determine the facts in civil and criminal proceedings." 391 U.S. at 156-57. But the basis of the jury trial right was not that juries were better at finding facts than judges, so much as that they might sometimes find them differently. "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Id.* at 156. The Court drew comfort from a recent study that concluded "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed. *Id.* at 157 (citing HARRY KALVEN, JR. (continued...)

Finally, there is a serious practical objection to basing the right to jury trial on pretrial promises. Trial judges in federal cases are statutorily obligated to base their sentences on the characteristics of the offense and of the offender. *See* 18 U.S.C. § 3553 (a) ("The court, in determining the particular sentence to be imposed, shall consider [among other factors] — (1) the nature and circumstances of the offense and the history and characteristics of the defendant"). The same is generally true of state courts as well. Judges cannot make sentencing decisions before trial without information about the defendant and the offense, and they cannot gather the necessary information before trial because of its enormous potential to prejudicially taint the determination of guilt or innocence. To limit the sentence pre-trial, a judge would have to make a subjective determination of "what the case is worth" before any witnesses are presented.[20]

Sentences are not bargaining chips for a judge to use to expedite court calendars when an accused is entitled to, and has declined to waive, a jury trial. A judge's promise may not be as important to the defendant as the right to jury trial in any given instance.[21] Certainly, it is not a bargain that

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[19](...continued)
& HANS ZEISEL, THE AMERICAN JURY (1966)). Additionally, as we discuss in part D, *supra*, the rights of the accused are not the only rights at stake. The citizenry has an interest in participating in the determination of guilt or innocence in any prosecution for which the legislature has authorized serious penalties, regardless of the judge's pre- or post-trial sentencing decision.

[20] *Cf. Scott*, 440 U.S. at 374 (Powell, J., concurring).

[21] There is an important practical difference as well between the decision in *Scott* to promise to impose no jail time, and the finer distinction of whether to impose more or less than six months' imprisonment.

should be forced on the defendant in derogation of the "most priceless" of our safeguards of individual liberty. *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961).

CONCLUSION

The judgments of conviction should be reversed, and the case remanded for a trial by jury.

Respectfully submitted,

DAVID A. REISER
(Counsel of Record)
Appellate Clinic
George Washington University
Law School
2000 G Street, N.W.
Washington, D.C. 20052
(202) 994-7463

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